

REPORTER'S NOTES TO RULE 31

This Rule was revised in 2009. As originally adopted in 1979, it codified existing practice under G.L. c. 279 § 4, which governed the procedure for a stay of execution pending appeal prior to the adoption of the Rules of Criminal Procedure.

Subdivision (a). Practice in the Commonwealth is that sentences are not routinely stayed pending appeal. *See Hagen v. Commonwealth*, 437 Mass. 374, 378 (2002). However, where a defendant meets the appropriate requirements, it has been a long standing tradition to grant a stay in the interest of justice, to avoid imprisoning one whose conviction may not survive appellate review. *See Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 513 (1979).

A judge should order a stay only when the defendant has met the two concerns which guide the exercise of discretion in this area. The first and most important is the likelihood of the defendant establishing on appeal that the conviction will be overturned. *Cf. Commonwealth v. Stewart*, 413 Mass. 664 (1992) (bail pending appeal is not appropriate if the only consequence of the defendant's success would be reducing the term of his sentence and not immediate discharge). This requirement does not demand that the defendant establish that the appeal is more likely than not to be successful, only that it presents "an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal." *See Commonwealth v. Hodge*, 380 Mass. 851, 855 (1980); *Commonwealth v. Allen*, 378 Mass. 489, 498 (1979). In this respect, the Massachusetts practice is more liberal than its federal counterpart. *Compare* 18 U.S.C. 3143(b)(1)(B) (the defendant must establish that the appeal "raises a substantial question of law or fact likely to result in" a favorable outcome).

The other factor that informs a judge's exercise of discretion in granting a stay is the question of security: whether the defendant will flee, commit another crime or present a danger to the community. *See Hodge*, 380 Mass. at 855. The same facts that are relevant to the decision to grant a defendant bail prior to trial are pertinent in this context as well. *See Allen*, 378 Mass. at 498.

In granting a stay, a judge may impose appropriate conditions on the defendant's release. *Cf. Commonwealth v. Beauchemin*, 410 Mass. 181, 186 (1991) (defendant not leave his home and have no minor visitors). G.L. c. 276 § 87 can be used as a vehicle for having the probation department monitor the defendant's conduct during a stay.

The trial judge may entertain a motion for a stay either before or after the entry of an appeal. Whether the judge grants or denies the motion, no statement of reasons is necessary nor must the judge make any particular finding or certification. *See Allen*, 378 Mass. at 1034.

This Rule does not address stays of execution of a sentence when an appeal is not pending. *See Commonwealth v. McLaughlin*, 431 Mass. 506, 518 (2000) (raising but not deciding the question of a judge's inherent power to stay a sentence for other reasons).

Appellate Rule 6 establishes the procedure that is available after the trial judge acts on a motion for a stay. Either the defendant or the Commonwealth may seek relief from a single justice of the court that will hear the appeal concerning the trial judge's decision to deny, *e.g.*, *Commonwealth v. Aviles*, 422 Mass. 1008 (1996), or grant, *e.g.* *Commonwealth v. Hodge*, 380 Mass. 851 (1980), a stay. In the ordinary course of events, for all but first degree murder cases a single justice of the Appeals Court is the appropriate forum.

Subdivision (b). Stay orders must inform the defendant of the conditions upon which they were issued. Mandatory conditions include the defendant's continuing obligation to provide the court in writing with a current address and to prosecute the appeal in a diligent manner. *See* Mass. R. A. P. 6 (b)(4). The court should craft whatever additional conditions are appropriate to each case.

The stay automatically expires when the appellate court considering the appeal releases a rescript affirming the conviction, unless the appellate court states otherwise. A rescript is "released" when it is announced to the public and the appellate court notifies the parties that the court has decided the case. *Cf.* Mass. R. App. P. 23 (requiring the clerk of the appellate court to mail the parties a copy of the rescript and the opinion, if any). In the ordinary course of events, the rescript "issues" twenty-eight days following the release date or upon the denial of any petition for rehearing or application for further appellate review, whichever is later. *Id*

The court that decided the appeal may exercise its discretion to extend a stay of execution pending a petition for rehearing, application for further appellate review, or petition for certiorari. Unless otherwise specified, an extended stay expires when the rescript issues. The appellate court may act *sua sponte* or pursuant to the defendant's motion, which may be filed before the appeal is decided or after the rescript is released. If the appeal is lodged in the Appeals Court, the defendant should file the motion with the panel that has the responsibility for deciding the merits of the appeal.

In order to ensure that the clerk of the appellate court can notify the parties that a stay has automatically expired, *see* Mass. R. App. P. 6 (b)(6), the clerk of the trial court must notify the appellate court whenever a stay is granted.

Once a rescript affirming the conviction is released, the burden is on the Commonwealth, not the defendant, to initiate the process for the sentence to be executed. *See Commonwealth v. Ly*, 450 Mass. 16, 20 (2007). This requires the prosecutor to file a motion with the trial court and for the court to schedule a hearing and notify the defendant. The court should schedule the hearing promptly. *Id.* at 22. If possible, the prosecutor should agree on a date for the hearing with the defendant's current counsel (in most cases that will be the lawyer who represented the defendant on appeal). The procedure for ensuring the defendant's appearance at the hearing to execute the sentence is modeled after the one described in Rule 6 (a). Ordinarily, the court should simply issue a notice to the defendant of the time and date of the hearing. The prosecutor, however, may accompany the motion for a hearing with a request that the court issue a warrant for the arrest of the defendant. If the prosecutor's submission establishes good cause to believe that a warrant is necessary in order to ensure the defendant's appearance, the court may order the defendant's

arrest. The defendant is not entitled to be heard on the question of whether a warrant should issue.

Subdivision (c). This subdivision departs from federal rule in that a stay of the payment of a fine is mandatory under this rule. This provision was adopted in recognition of the difficulty a defendant has, upon the successful appeal of his judgment, in recovering money he has paid in satisfaction of a fine.

Subdivision (d). This subdivision was originally based, in part, on Fed. R. Crim. P. 38(a)(4) and upon G.L. c. 279 § 4.